No. 87-2048

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

TEXACO INC.,

Petitioner,

—*vs.*—

RICKY HASBROUCK, d/b/a RICK'S TEXACO, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S RESPONSE TO BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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The Brief for the United States (hereafter "U.S. Brief") confirms that:

1. The court below was mistaken in believing prior decisions of this Court required construing the Robinson-Patman Act to make it unlawful for manufacturers to sell at lower prices to wholesalers than retailers unless impossible conditions are met.[1] As the U.S. Brief

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1 The U.S. Brief is emphatic:

"We do not agree with the court of appeals' formulation of the applicable legal standard in this case. The court stated that a supplier that sells at uniform prices to purchasers at the same 'functional' level in the distribution chain nonetheless may be liable under the Robinson-Patman Act if the discount afforded to a par-

explains, ". . . it is not a construction that this Court has ever adopted." (U.S. Br. 8);

2. The lower court's expansion of Robinson-Patman Act liability is contrary to the intent of Congress;[2] and—most significant from the standpoint of need for prompt correction by this Court—

3. The rule formulated by the court below can have devastating consequences for antitrust policy, for the economy and particularly for the small businesses that are wholesalers.

The concerns expressed by the *amici*—from the various wholesaler and independent marketer groups to the National Association of Manufacturers—are underscored by the U.S. Brief. It observes:

> "A rule broadly subjecting suppliers to the threat of damage liability if an independent wholesaler elects to undercut the supplier's price to retailers—and if a jury later concludes that the wholesale discount was not cost based—would represent a significant extension of the law. Under such a rule, a supplier could protect itself from liability only by eliminating the functional discount or by attempting to tailor the discount precisely to the costs and pricing strategies of each individual wholesaler. The former alternative would eliminate the ability of most independent wholesalers to compete with the supplier and thus would be tantamount to outlawing systems of dual distribution.

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ticular independent wholesaler is not 'cost-based' and if the wholesaler passes on a portion of that discount to firms that compete with other customers of the supplier." (U.S. Br. 8).

2 As the U.S. Brief explains, "allowing liability to be imposed on the supplier when the disparity in the prices available to firms at the same functional level comes into being only as a result of the intervening pricing decision of an independent firm would, in general, extend the statute beyond the reach intended by Congress." (U.S. Br. 9).

> The latter alternative is probably impossible, since it would require the supplier to obtain data about the costs and pricing strategies of the wholesalers with which the supplier competes for retail sales. Even if it were possible to obtain such data, this strategy would still entail administrative burdens that could impede development of efficient pricing systems. Cf. *Falls City*, 460 U.S. at 449 (a requirement that the "meeting competition" defense be applied on a customer-by-customer basis might make meaningful price competition unrealistically expensive). For example, if the supplier did somehow obtain the necessary data and attempted to tailor the functional discount to each individual wholesaler, it would risk liability for discriminating among wholesalers if it failed to calibrate the discount precisely and thereby caused competitive injury to a wholesaler.
>
> Moreover, suppliers' efforts to avoid liability could penalize efficiency and discourage price competition. The wholesalers most likely to have their discounts reduced or eliminated by suppliers fearful of liability under the Act would be the ones with the lowest distribution costs and the most aggressively competitive pricing policies. [footnote omitted] Thus, such a construction of the Act would conflict with this Court's admonitions that, whenever possible, courts should avoid interpretations of the Robinson-Patman Act that undercut the procompetitive purposes of the antitrust laws." U.S. Br. 9-11.

While acknowledging the array of detrimental consequences of the legal rule formulated below, the U.S. Brief recommends this Court do nothing, leaving the rule to cause confusion and inhibit wholesaling generally, and to be absolutely controlling in the nine states comprising the Ninth Circuit. That court, in this very case, admonished the district courts that they may not decline to follow the legal construction adopted by the court of appeals "no matter how egregiously in error they may feel their

own circuit to be." *Hasbrouck* v. *Texaco Inc.*, 663 F.2d 930, 933 (9th Cir. 1981), *cert. denied*, 459 U.S. 828 (1982).[3]

Respectfully, the premises upon which the recommendation is made are mistaken.

A. First, the U.S. Brief asserts it is constrained to reach its conclusion because of the statement in *Black* v. *Cutter Laboratories*, 351 U.S. 292, 297 (1956) that "[t]his Court . . . reviews judgments, not statements in opinions." (U.S. Br. 6). *Black* involved review of a *state* court decision found to rest on an adequate state ground. As this Court explained there:

> "This means no more than that we should not pass on federal questions discussed in the opinion where it appears that the judgment rests on adequate state grounds." 351 U.S. at 298.

Plainly, establishment of a new, destructive, construction of the federal antitrust laws by a major federal court of appeals, whose rule is controlling in its circuit and potentially disruptive nationwide, is hardly comparable to an erroneous statement of federal law by a state court whose decision rests on state grounds. The present case invokes an entirely different level of

3 The district court had granted judgment n.o.v. in favor of Texaco because plaintiffs, notwithstanding this Court's decision in *Brunswick Corp.* v. *Pueblo Bowl-O-Mat*, 429 U.S. 477 (1977), chose to confine their evidence to "automatic damages" pursuant to the Ninth Circuit's pre-*Brunswick* opinion in *Fowler Mfg. Co.* v. *Gorlick*, 415 F.2d 1248 (9th Cir. 1969), *cert. denied*, 396 U.S. 1012 (1970). The district court correctly recognized that *Brunswick* effectively undermined *Fowler*. By the time of the appeal, this Court too had explicitly rejected "automatic damages" on the basis of *Brunswick* in *J. Truett Payne* v. *Chrysler Motors Corp.*, 451 U.S. 557 (1981). The Ninth Circuit acknowledged that "*J. Truett Payne* confirms the trial court's ultimate conclusion . . . ." (663 F.2d at 932) and that "the Supreme Court relied upon *Brunswick* in deciding *J. Truett Payne* . . . ." (663 F.2d at 933 n.1). Nonetheless, it remanded for a new trial, concluding that the district court erred by considering *Brunswick* and not blindly following *Fowler* until it was explicitly overruled.

this Court's responsibility. *Cf. Dawson Chemical Co.* v. *Rohm & Haas Co.*, 448 U.S. 176, 185 (1980).[4]

The decision of the court of appeals neither rests on any state ground nor, indeed, on any ground other than that enunciated by the Ninth Circuit.[5]

B. Second, although it would seem malpractice or at least foolhardy for any lawyer or client to conclude that the Ninth Circuit did not mean precisely what it repeatedly said the Robinson-Patman Act requires of those selling to wholesalers, the U.S. Brief suggests as a reason for denying review the tentative possibility that someone may read into the Ninth Circuit's new construction of the Robinson-Patman Act a further requirement of awareness by a supplier that a wholesaler has at some time passed along some portion of its discount to a retailer customer. The addition of an "awareness" requirement is based upon an ambiguous statement in the jury charge, which was not mentioned by the court of appeals, relating to the assessment of competitive effect. The U.S. Brief urges that if the decision below is "read in this limited fashion," the "serious concerns that we have discussed above about a rule requiring suppliers to prove affirmatively that wholesaler discounts are cost based do not apply with the same force . . . ." (U.S. Br. 13-14).

4 Noting that although "[t]here is no direct conflict, but a number of decisions exhibit some tension on questions of patent misuse and the scope of 35 U.S.C. § 271(d)," (448 U.S. at 185 n.4), the Court in *Dawson* "granted certiorari . . . to forestall a possible conflict in the lower courts and to resolve an issue of prime importance in the administration of the patent law." Given the seriously harmful potential of the Ninth Circuit's decision, as the U.S. Brief acknowledges, this case presents an even more compelling basis for this Court's attention.

5 And, as the U.S. Brief implicitly recognizes in noting that upon a new trial respondents "would be required to present different evidence as to damages," (U.S. Br. 17 n.23), the present judgment is not sustainable.

Respectfully, not only is the prospect for such a "limited" reading uncertain at best,[6] it hardly would eliminate the various "serious concerns" recognized by the United States. While there always may be complaints from retailers that others are selling below where they would like the consumer price to be,[7] what would the United States have the manufacturer do when it receives such a complaint? Demand that the price-cutting retailer's wholesaler disclose its pricing and its costs, and propose to monitor them from now on? To what end? Terminate the efficient or price-cutting wholesaler? Discriminate in price against that wholesaler? Demand that the wholesaler induce its retailer to get its price up or terminate the retailer? Just get the wholesaler to agree it will not pass along any of its discount to any of its retailers? Respectfully, reading in an "awareness" requirement makes no antitrust or economic sense and will merely generate and prolong litigation. Indeed, the U.S. Brief does not purport to be a proponent of the Ninth Circuit's rule even with the addition of an "awareness" gloss. Rather, it leaves open the "correct ultimate resolution" (U.S. Br. 13) of this issue. The U.S. Brief underscores the need for this Court to clarify Robinson-Patman liability in respects that so fundamentally impact virtually all American industry and commerce.

C. Finally, the U.S. Brief conjectures that perhaps the courts below should not even have addressed the issue of a supplier's

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6 The U.S. Brief does not claim the case does not stand "for the proposition that a supplier must undertake affirmatively to monitor the costs and pricing policies of wholesalers to which it offers a functional discount" but merely that "[w]e do not believe that the case *necessarily* stands" for such a proposition. (U.S. Br. 6-7; emphasis added). Despite this understandable hestitancy, the U.S. Brief unaccountably rewrites the first Question Presented to assume that the court below *sub silentio* adopted an "awareness" requirement.

7 As this Court recognized in *Monsanto Co.* v. *Spray-Rite Service Corp.*, 465 U.S. 752, 763 (1984):

> "[C]omplaints about price cutters 'are natural—and from the manufacturer's perspective, unavoidable—reactions by distributors to the activities of their rivals.' "

Making complaining about a rival's lower price a predicate to windfall treble damage recoveries, of course, would serve to further encourage proliferation of such complaints.

liability for selling at a uniform price to wholesalers who sell to independent retailers, suggesting it might have been possible to rest the case on Dompier's retail operations (U.S. Br. 16-17).[8] However, the U.S. Brief acknowledges, obliquely to be sure, that plaintiffs chose to base damages on Dompier's wholesale sales to independent retailers (*id.* at 17 n.23), so that the verdict simply could not have been sustained without confronting the issue of wholesaling. Indeed, plaintiffs themselves advised the jury that Dompier did not acquire its first retailer until 30 months into the damage period and acquired a few others only over several years (Tr. 3183). Plaintiffs also necessarily drew no distinction between independent retailers and employee-operated stations in addressing other elements of Robinson-Patman liability, such as competition between favored and non-favored customers and competitive impact. (B-6 n.6).

Thus, with respect to competitive impact, although it was an admitted fact that Dompier's prices were set solely by Dompier (ER 539-40), plaintiffs' counsel advised the jury:

> "This case could have been brought if Mr. Dompier had never salary operated a station, but it only supplied stations the whole time if he was passing the discount to them. . . . If the favored price is passed through the purchaser like Mr. Dompier to his customer, that's price discrimination." (Tr. 3304)

The district court also instructed the jury that the basis of plaintiffs' claim is that lower prices to Dompier "were passed through to Dompier Oil Company's customers." (Tr. 3334). Under the circumstances, there is no basis for suggesting otherwise or attempting to conjecture about the possible outcome of

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8 The district court noted that Dompier "eventually operated four Texaco retail stations" (B-4 n.4); Dompier continued to act as a pure wholesaler to some twelve independent retailers (ER 34-35). The reference by the U.S. Brief (16 n.20) to testimony of Neil Dompier about the high percentage of his business being "retail", was a comparison of his sales to retailers (retail sales) as against other accounts such as farmers; he was not differentiating between employee-operated and independent-operated retail outlets.

a third trial that would not be based upon Dompier's independent sales to independent retailers.

In any event, once this Court has corrected the crucially erroneous standards of Robinson-Patman liability formulated by the court of appeals, it may remand for determination of whether the action should be dismissed or whether an alternative disposition is appropriate.[9]

Conclusion

As the Brief of the United States demonstrates, the standards of Robinson-Patman liability on sales to wholesalers adopted by the court of appeals are wrong and give rise to serious concerns for the future of wholesaling and the businesses presently in that field. The matter is of major national significance, compelling this Court's attention. Respectfully, the petition for a writ of certiorari should be granted.

Dated: June 2, 1989

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9 At trial, plaintiffs chose to make it impossible for the jury to exclude from damages amounts attributable to the period before mid-1974 when Dompier operated no retail stations. Since the jury could not segregate that period out, plaintiffs acknowledged that if they were not entitled to damages for the entire period, "they haven't proven their damage theory with reasonable certainty . . . and the plaintiffs aren't entitled to a verdict." (ER 530). While this representation was in the context of a discussion of the "meeting competition" defense, the principle would seem equally applicable whatever the basis for the legality of the prices during that period. The U.S. Brief questions whether this is so. (U.S. Br. 16). Plainly, the matter can be resolved by the courts below upon remand.

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